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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A.D., 1985

NO. 85-539

MICHAEL LANE, Director, Illinois Department of Corrections, and Neil F. Hartigan, Attorney General, State of Illinois,

Petitioner,

vs.

United State of America ex.rel. Jimmie Enoch, Melvin Enoch, and Robert Enoch,

Respondent.

ON THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

# RESPONDENT'S BRIEF IN OPPOSITION

JAMES J. DOHERTY
Public Defender of Cook County

JEFFREY R. MARTIN
Assistant Public Defender
2650 South California Avenue
7th Floor
Chicago, Illinois 60608
(312) 890-3217

## QUESTION PRESENTED FOR REVIEW

Whether the court below properly balanced the defendants' right to present witnesses in their own behalf against the State's interest in applying a pre-trial discovery sanction.

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THE COURT BELOW PROPERLY BALANCED THE DEFENDANTS' RIGHT TO PRESENT WITNESSES IN THEIR OWN BEHALF AGAINST THE STATE'S INTEREST IN APPLYING A PRE-TRIAL DISCOVERY SANCTION.

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| MICHAEL LANE, Director, Illinois Department of Corrections, and Neil F. Hartigan, Attorney General, State of Illinois, Petitioner, vs. United State of America ex. rel. Jimmie Enoch, Melvin Enoch, and Robert Enoch, Respondent. | ON THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT. |

## OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at United States ex. rel. Enoch v. Hartigan, 768 F 2d 161(7th Cir. 1985). A copy of the opinion is attached to the petition as Appendix A. The opinion of the United States District Court for the Northern District of Illinois is reported of United States ex. rel. Enoch v. Lane, 581 F Supp. 423 (N.D. Ill. 1984). A copy of the opinion is attached to the petition as Appendix B. The order of the Appellate Court of Illinois is unpublished pursuant to Ill. Rev. Stat. § Ch. 110A, sec. 23. A copy of the order is attached to the petition as Appendix C.

## JURISDICTION

Petitioner invokes this courts' jurisdiction pursuant to 28 U.S.C. sec. 1254 (1). However, as set forth below, no good reason exists for this Court to exercise its discretion in granting the petition for a Writ of Certiorari.

## STATEMENT OF FACTS

On December 5, 1979 Teresa Mosley and Michael Mayberry went to Sandra Davis' apartment. Mosley had known Davis for approximately five years; they had been prostitutes together. (R. 260-263). After purchasing marijuana, beer, and gin, Davis, Mosley and Mayberry attended a party in the apartment of Sharon Edwards at 2031 South Clark Street, Chicago. Also present were Melvin, Jimmie, Robert, Charles and Peggy Enoch and Joyce Darnell. At that time Sandra Davis' face was not bruised. According to Charles Enoch she just looked "high". (R.256). The party broke-up at approximately 6:00 the following morning, and it was at that time that Sandra Davis and the others left Ms. Edward's apartment. (R.262-269, 274-275, 241-244, 255-256, 293-294, 314-315, 317-319).

Sandra Davis, however, testified that she went to visit her cousin, Pamela Shaviers, on the evening of December 5, 1979. Davis left her cousin at 4:15 the following morning and rode the CTA toward her home at 2039 South State Street. (R.51-53, 341-343) Davis state that as she walked past 2031 South Clark Street she saw Melvin and "Sonny" (i.e., Robert) Enoch. Robert stopped her and asked for a cigarette. He then grabbed her by the arm and said that he was going to take her body. (R.53-56) Davis "snapped" away from Robert. He grabbed her again and pushed her toward the elevator. Davis said she saw a gun in Robert's "belt line". (R.57-58).

Robert put his hand on the gun and told Davis they were going to take her upstairs and rape her. Davis, Robert and Melvin left the elevator at the 14th floor. Melvin opened the door to apartment 1403 with a key, and Robert cautioned Davis not to make noise because their mother was asleep in the apartment. (R.58-60) Davis was taken to a back bedroom with two beds. Doug Enoch was apparently asleep in one of the beds.

Robert slapped Davis and then struck the side of her head with the gun (R.60-61). She stated that Robert removed his clothes and then hers, and forced her to have intercourse. (R.61-63).

Robert left the bedroom, and Melvin entered. Davis testified that Melvin struck her, choked her, and then forced her to have intercourse. (R.63-64). Melvin left the room, and Jimmie entered. He too forced her to have intercourse. (R.65-66). After Jimmie left, Robert returned and told Davis he wasn't finished. He again forced her to have sex. (R.66-67) Robert told Davis that she didn't have to worry because she now belonged to him. He also told her that if she mentioned the incident to anyone, to her mother or the police, that they would kill her. (R.67-68) Dough Enoch apparently slept through the entire incident. (R.73-74).

Davis testified that she left the Enoch apartment at approximately 7:25 a.m. She went home where she laid down until after 12:00 p.m. She then told her mother "(t)hat Sonny and them had raped me". (R.69-70). The police were then called and Davis was taken to Mercy Hospital. (R.70-71) She was examined by Dr. John Patterson who testified that she had been badly beaten and her vagina contained a large quantity of seminal fluid. (R.99-100, 105,106-107) Davis told Dr. Patterson that she had been raped by three men. (R.110-111)

The defendants' mother, Willie Enoch, testified that on the night in question Melvin and Jimmie left her apartment between 8:00 and 9:00 p.m. Mrs. Enoch let them back into the apartment between 4:00 and 4:30 a.m. She had only keys to the apartment. (R.193, 209-210) She stated that she was awake all night watching T.V. in her bedroom and she did not leave the apartment before morning. She heard no commotion, loud noises, or screams, (R.1960 200).

At this point, the defense moved to amend its answer to discovery and informed the court it had become aware of a new witness approximately one-half hour earlier.

Defense counsel asserted that this witness, Patricia Griffin, would testify that in the early morning hours of the day in question, she was in the bedroom of her apartment. At that time she was awake and getting ready for work. At approximately 7:00 a.m. on her way to work, she observed Sandra Davis, whom she had known since she was a little girl, arguing with a man. The man was very loud and said something to the effect: "bitch, where is the money?" He used foul language. (R.224-227,231).

Defense counsel further informed the court that while they had been in contact with the defendants' family since the beginning of the case, they had only just learned of this witness. Counsel offered to make this witness available to the State for an interview and give them time to investigate her. The State objected to this witness' testimony as untimely under the discovery rules. The Court sustained the objection on these grounds and would not allow Mrs. Griffin to testify. (R.228-232).

The jury found the defendants guilty of rape and aggravated kidnapping. (R.420-421) On July 11, 1980, a defense motion for a new trial was denied. (R.424) The Court sentenced Robert and Jimmie Enoch to concurrent terms of 25 years, and Melvin Enoch to concurrent terms of 12 years. (R.425-432, 434).

The Appellate Court of Illinois affirmed these convictions on March 31, 1982. On February 23, 1984 the United States District Court granted the defendants' petition for a Writ of Habeas Corpus. The United States Court of Appeals affirmed the District Court on July 18, 1985. As of this writing, the case is set for re-trial on January 6, 1986 in the Circuit Court of Cook County, Illinois. Both parties expect trial to commence on that date.

## REASONS FOR DENYING THE WRIT

THE COURT BELOW PROPERLY BALANCED THE DEFENDANTS' RIGHT TO PRESENT WITNESSES IN THEIR OWN BEHALF AGAINST THE STATE'S INTEREST IN APPLYING A PRE-TRIAL DISCOVERY SANCTION.

A writ of certiorari should be denied here because, as the United States Court of Appeals held below, the State's interest in the imposition of the exclusion sanction for violation of the State discovery rules should be weighed against the defendants' Sixth Amendment right to a fair trial. U.S. ex. rel. Enoch v. Hartigan, 768 F 2d. 161, 162-163 (7th Cir. 1985).

The purpose of the Illinois discovery rule at issue in this case is to "eliminate unfair surprise and allow the opposing party to establish the truth or falsity of the defense". Ill. Rev. Stat. (1985) Ch. 110A, sec. 413 (d) (committe comments). The imposition of exclusion as a sanction for a perceived violation of the rule in this case defeated its very purpose.

On the third day of trial, after the defense had begun to present its case, defense counsel informed the court and the prosecution that it had (within the preceding half hour) just become aware of a new and important witness. Although the defense had been in contact with the defendants' family since the inception of the case, they had not learned of the existence of Patricia Griffin until that late hour. Counsel's motion to amend its discovery answer and present Mrs. Griffin's testimony was, however, denied. (R. 224-225, 229-232).

The defense offer of proof regarding Mrs. Griffin's testimony demonstrated that it would be highly relevant and material. The prosecution objected to the defense motion and moved to bar Griffin's testimony on the ground of untimely disclosure. (R.225-226, 229-229). The defense offered to make Mrs. Griffin available to the prosecution for an interview. It suggested a continuance in order to permit the State to investigate this new aspect of the case, and was prepared to allow the State to re-open their case.

The court, nevertheless, barred the testimony of Patricia Griffin because it believed the defense had violated the discovery rules. (R.228-232).

Exclusion of Griffin's testimony was an abuse of discretion by the trial court and not the proper sanction for it to impose. As suggested by defense counsel at the time, the court should have granted the State a continuance to investigate this new development and, perhaps, should have allowed the State to re-open its case. This would have obviated any possible prejudice the late disclosure would have had, and comported with the sanctions explicitly available under the Illinois discovery rules. Ill. Rev. Stat., (1980), Ch. 110A, § sec. 415 (g). As the Illinois courts have held, "the exclusion of evidence is so drastic a solution that it should be applied only where there is flagrant or wilful disregard of the court's authority". People v. Ramshaw, 75 Ill. App. 3d 123, 394 N.E. 2d 21, 22 (5th Dist. 1979). Here there was no flagrant or willful disregard of the court's authority. The Court and the prosecution were informed of the new evidence within half an hour of its discovery by the defense. As this court held in Chambers v. Mississippi,

> "(t)he goal of pre-trial discovery in both civil and criminal cases has been to promote the fact-finding process and to eliminate the tactical advantage of surprise by either side. Sanctions are designed to accomplisn the purpose of discovery but it is clear that the imposition of sanctions should not encroach on a fair trial.... "Few rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers v. Mississippi, 410 U.S. 284, 302.

The various cases, cited by the State to show inconsistent treatment of this issue among the circuits, all ultimately enunciate a balancing test. Ronson v. Commissioner of Cor. of State of New York 604 F. 2d 176 (2d cir., 1979) was a least restrictive alternative analysis holding that any violation could have been dealt with by granting a continuance. Fendler v. Goldsmith, 717 F. 2d 1552 (9th cir. 1983) held that a balancing test was appropriate and that less severe sanctions would have obviated any prejudice or unfair surprise to the prosecution.

United States v. Davis, 639 F 2d 239 (5th cir. 1981) held that it was improper to exclude "otherwise admissible evidence solely as a sanction to enforce discovery rules or orders against criminal defendants.(emphasis added) 639 F 2d 243. The clear implication from the court's analysis of the issue is that, had the State demonstrated some prejudice, that would have been balanced against the defendant's right to present evidence.

In this case the State demonstrated no unfair surprise or prejudice. They moved the trial court to bar Mrs. Griffin's testimony on the ground of untimely disclosure. The State here seeks to hide behind a technicality and thus deprive the accused citizens of perhaps their most fundamental constitution right: the right to present a defense.

## CONCLUSION

Jimmie Enoch, Melvin Enoch, and Robert Enoch respectfully request this Honorable Court deny the petition for a Writ of Certiorari.

Respectfully submitted,

JAMES J. DOHERTY
Public Defender of Cook County

JEFFREY R. MARTIN
Assistant Public Defender
2650 South California Avenue
7th Floor
Chicago, Illinois 60608
(312) 890-3217